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Federal Communications Commission  
Office of Secretary

JOHN CRIGLER

July 10, 1996

OUR FILE NO.  
0159-100-60

Mr. William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RE: MM Docket No. 96-16

Dear Mr. Caton:

Transmitted herewith, are the original and ten copies of the Comments of Haley Bader & Potts, P.L.C., submitted in response to the Order and Notice of Proposed Rule Making, *FCC 96-49* (released February 16, 1996). Please refer any questions concerning this matter directly to this office.

Respectfully submitted,



John Crigler

Enclosures (10)

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JUL 10 1996

Federal Communications Commission  
Office of Secretary

Before The  
**Federal Communications Commission**  
Washington, D.C. 20554

In The Matter Of

Streamlining Broadcast EEO )  
Rule and Policies, Vacating the EEO )  
Forfeiture Policy Statement and )  
Amending Section 1.80 of the )  
Commission's Rules To Include )  
EEO Forfeiture Guidelines )

MM Docket No. 96-16

TO: The Commission

**COMMENTS OF HALEY BADER & POTTS P.L.C.**

July 10, 1996

## SUMMARY

On behalf of its commercial broadcast clients and the Montana Broadcasters Association, Haley Bader & Potts files the following Comments in response to the Commission's Order and Notice of Proposed Rule Making, FCC 96-49 (released February 16, 1996), ("NPRM"). The NPRM invites comment on a number of proposals for revising the Commission's current EEO Program, as well as upon a Petition for Rule Making filed by Haley Bader & Potts in August, 1995.

The Haley Bader & Potts Comments are divided into three parts. Part I addresses the question of the constitutional standard to be applied to EEO programs. As urged in its Petition, Haley Bader & Potts believes that the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña* compels a strict standard of constitutional review. The Commission rejects this conclusion and contends that its EEO Program is not a racial classification system, but a "mere outreach" program which requires only that broadcast stations expand job recruitment efforts. This contention will not withstand examination. The EEO Program is a compulsory, not a voluntary, program which is designed to, and in practice does, affect hiring decisions. Strict scrutiny applies.

Part 2 of the Comments demonstrates that the EEO Program does not advance a compelling governmental interest and is not narrowly tailored to achieve its stated purpose. The Commission has consistently maintained that the "overriding goal underlying our EEO Rules is to promote program diversity." Yet for more than a quarter of a century, "program diversity" has remained a mere mantra. The Commission has never established a standard for determining when Programming is "diverse," nor ever excused a station from recruitment obligations because it has achieved a sufficient degree of diversity. The forfeitures proposed by the NPRM are totally unrelated to the stated goal of achieving diversity. Haley Bader & Potts recommends that the Commission scale back its EEO Program to one limited to punishing licensees found to have engaged in discriminatory conduct.

Part III of the Comments discusses various proposals for "streamlining" the EEO Program. Rather than discuss these in a vacuum, Haley Bader & Potts surveyed its clients and asked them to estimate the degree of relief that would be provided by particular proposals. As a result of that survey, Haley Bader & Potts urges the Commission to expand exemption thresholds, allow new recruitment options, and relax its policy permitting the use of alternative labor statistics.

Before The  
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EEO Forfeiture Guidelines	)	
TO:		The Commission

**COMMENTS OF HALEY BADER & POTTS P.L.C.**

The law firm of Haley Bader & Potts P.L.C., on behalf of its broadcast clients and the Montana Broadcasters Association, hereby submits its comments in response to the *Order and Notice of Proposed Rule Making*, FCC 96-49 (released February 16, 1996)(“NPRM”).

**INTRODUCTION**

The Haley Bader & Potts Comments are divided into three parts. Part I addresses the constitutional standard that must be applied to the rules, policies and procedures which collectively comprise the FCC’s “EEO Program.” Haley Bader & Potts contends that the EEO Program is subject to a standard of strict scrutiny. Part II addresses the proposed forfeiture schedule. It opposes adoption of the schedule on grounds that, as proposed, the schedule is overly complex and unrelated to the goals of the EEO Program. Part III addresses proposed modifications to the EEO Program. It examines the burdens which the EEO Program currently

imposes on broadcast stations and the relief that might be provided by proposals outlined in the NPRM.

Although these Comments are critical of both the current EEO Program and of many proposed modifications, the Comments do not, in any fashion, condone discrimination based upon race or gender. As discussed below, the Commission is justified in finding that adjudicated instances of discrimination may affect basic qualifications to hold a broadcast license. Nothing in these Comments is intended to suggest that voluntary referral, recruitment, and training efforts should not be pursued vigorously, or that improving relations among the races should not be an imperative for the broadcast industry.

## **I. CONSTITUTIONAL CONSIDERATIONS**

### **A. THE FCC'S EEO PROGRAM IS SUBJECT TO STRICT SCRUTINY.**

On August 18, 1995, Haley Bader & Potts filed a petition, attached as Attachment 1, which asked the Commission to review and, as necessary, revise or rescind its EEO Program in light of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. \_\_\_\_\_, 115 S. Ct. 2097 (1995). In *Adarand*, a nonminority firm challenged the constitutionality of a Department of Transportation ("DOT") program that compensated prime government contractors who hired "socially disadvantaged" subcontractors. In considering the standard of review to be applied in such cases, the Court held that "all racial classifications, imposed by whatever federal, state, or local

governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 2113. The Court expressly overruled *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), to the extent that it applied a lesser, “intermediate” level of scrutiny to federal classification systems based on race. The Court also held that a strict standard of review was appropriate, regardless of whether the purpose of the classification was invidious or “benign.” *Id.*

To satisfy strict scrutiny, the government must demonstrate that a classification scheme involving race serves a compelling governmental interest and is narrowly tailored to serve that interest. *Id.* By contrast, an intermediate level scrutiny requires only that the classification serve an “important” governmental interest and be “substantially related” to the achievement of that objective. See *Metro Broadcasting*, 497 U.S. at 564-565.

In inviting comment on Haley Bader & Potts’ proposal to evaluate the EEO Program under standards of strict scrutiny, the NPRM apparently takes the position that the EEO Program does not involve a “racial classification” and is therefore not subject to a strict standard of review. In support of this position, the Commission contends that its EEO program “does not mandate that broadcasters employ any person on the basis of race,” NPRM at para. 15, and that the Program adopts an “efforts-based approach.” The Commission takes a similar position in its recent *Memorandum Opinion and Order and Notice of Apparent Liability*, FCC 96-275 (released June 28, 1996) (*Tidewater Communications, Inc.*). There, it maintains that its EEO Program is “fundamentally different from

a race-based program such as that at issue in *Adarand*" in that the EEO Program:

does not require that any person be hired or accorded a hiring preference based on racial or ethnic status. Rather, it requires that licensees make efforts to recruit minority and women applicants so that they will be ensured access to the hiring process. The ultimate decision as to whether to hire a particular applicant may be premised upon any nondiscriminatory considerations, without regard to the applicant's race, ethnicity or gender status. Further, our Rule does not require licensees to hire any prescribed "quota" of minorities or women. Thus, our EEO Rule imposes no requirement that would operate to deprive any person of a benefit he or she might receive but for his or her race, ethnicity, or gender. *Id.* at para. 5.

In support of its argument that *Adarand* is inapplicable to its EEO Program, the Commission also relies on comments contained in a June 28, 1995 Department of Justice Memorandum to All Agency General Counsels ("1995 DOJ Memo"), and, in particular, on the statement that :

Mere outreach and recruitment efforts....typically should not be subject to *Adarand* standards. Indeed, post-*[Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)]* cases indicate that such efforts are considered race neutral means of increasing minority opportunity . . . . If the government does not use racial or ethnic classifications in selecting persons from the expanded pool, *Adarand* ordinarily would be inapplicable. 1995 DOJ Memo at 7 (footnotes omitted).

NPRM, para. 15.

The impact of the 1995 DOJ Memo's conclusion is clearer if the cases cited in the omitted footnote are carefully considered. Footnote 12 of the 1995 DOJ Memo cites three cases in support of the proposition that *Adarand* may be inapplicable to certain affirmative action programs.

Each of the three cases concerns recruitment or preference systems used by governmental entities as part of hiring programs for *governmental* employees. None of the three cases involves the issue of whether the government may impose an affirmative action plan on a regulated entity. Each case, in fact, applies strict scrutiny to the system under review.

*Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1552 (11th Cir. 1994), held that “in assessing the propriety of any classification based upon race in an affirmative action plan, we are required to conduct a strict scrutiny analysis.” Strict scrutiny was applied to an affirmative action plan used by Metropolitan Dade County, Florida in hiring firefighters. As part of this analysis, the court concluded that high school and college recruitment programs used by the Fire Department to provide information and solicit applications had been an ineffective but “race neutral” means of overcoming flaws in testing procedures that adversely affected minority applicants.

*Billish v. City of Chicago*, 962 F. 2d 1269 (7th Cir. 1992), *vacated on other grounds*, 989 F.2d 890 (7th Cir.) (en banc), (cert. Denied), 114 S.Ct. 290 (1993), applied strict scrutiny to an affirmative action plan implemented by the City of Chicago to increase the promotion of minorities in its Fire Department. The appellate court upheld the district court’s ruling that the plan was narrowly tailored to serve a remedial end. The affirmative action plan at issue was “flexible and limited in duration.” 962 F.2d at 1290. It was reviewed annually, and was designed to last only for three years or until 350 promotions had occurred.

*Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992), applied strict scrutiny to programs of King County, Washington, which awarded preferences to minority-owned businesses. The court found that before adopting its preference system, the county had considered race-neutral alternatives by annually hosting one or two training sessions for small businesses and providing information on how to obtain access to small business assistance programs. *Id.* at 923.

Each of the cases cited in the 1995 DOJ Memo considers affirmative action plans adopted by governmental entities for the recruitment and hiring of *governmental* employees. The fact that the cases are limited to such circumstances is emphasized in a February 29, 1996 DOJ Memorandum to General Counsels regarding “Post-*Adarand* Guidance on Affirmative Action in Federal Employment (“1996 DOJ Memo”). The 1996 DOJ Memo notes that “as indicated in the [1995 DOJ Memo], although Adarand was a challenge to a Department of Transportation contracting program, its holding applies to race-based decision-making in all areas of federal activity, including employment.” The 1996 DOJ Memo goes on to give detailed guidance “on the use of affirmative action in federal employment.” 1996 DOJ Memo, p. 1 (emphasis added).

Haley Bader & Potts does not disagree with the proposition that the FCC has considerable leeway in devising recruitment or outreach programs for hiring its own employees. Haley Bader & Potts does disagree with the conclusion that there is no meaningful distinction between such an affirmative action plan and the EEO Program imposed

by the FCC on the broadcast industry. The following distinctions are relevant:

- An agency's self-imposed agency plan is voluntary and non-binding. The FCC's EEO Program is rigorously applied to regulated entities.
- Voluntary plans are non-punitive. The FCC's EEO Program is enforced by a wide range of sanctions. While an agency's failure to follow its own plan has no adverse consequences for the agency, a broadcaster's failure to comply with EEO requirements is punishable by monetary forfeitures and a variety of sanctions affecting its license to broadcast. See NPRM, paras. 37-45.
- Voluntary plans are simple and flexible (e.g. King County could hold as many or as few training sessions as it wished in the plan considered in *Coral Construction Co, supra*). The FCC's EEO Program is highly structured and complex. The FCC requires broadcast licensees to establish detailed plans, to follow those plans faithfully, to assess and revise those plans continuously, and to document all activities related to hiring opportunities. Forfeitures are increased depending upon the extent to which a licensee fails to comply with detailed requirements of the EEO Program. See NPRM, paras. 37-45.

- Unlike an affirmative action plan such as that used by Chicago in *Billish*, the FCC's EEO program is indefinite in duration. As noted in the NPRM at para. 4, the core requirements of the EEO Program have been in effect since 1969. The FCC has no plan for phasing out its EEO Program.

Contrary to the Commission's claims, its EEO Program is not "race neutral." Racial distinctions are central, not peripheral, to the Program. Any broadcast station that employs five or more full-time employees must adopt a "model" EEO plan. The station must recruit candidates from five designated minority groups for each job opening from a number of minority recruitment sources and must make special efforts to recruit and hire minorities from the "dominant" minority group. Job openings must be advertised in "minority specific" publications. Sanctions are levied for unsatisfactory efforts to recruit from minority referral sources or to advertise in minority publications. See NPRM, para. 11.

Recruitment efforts are required to be "effective." The proposed amendments to the FCC's forfeiture guidelines, which purport to codify existing law, require the broadcaster to "recruit . . . so as to attract an adequate pool of minority applicants." NPRM, p. 26. In order to determine whether recruitment efforts are effective, stations are required to collect information about the race of each job applicant and interviewee, even when the collection of that information may contravene state or local law. See *Memorandum Opinion and Order*, 4 FCC Rcd. 1715 (1989).

In applying for renewal of its broadcast license, the licensee must file a Broadcast Equal Employment Opportunity Program Report (FCC Form 396) which details information about the racial characteristics of applicants for each job opening that has occurred during the past twelve months.

Most tellingly, the station's EEO efforts are subjected to intensive scrutiny if they fail to meet certain "processing guidelines based on employment statistics." *See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978). Stations with five to ten full-time employees do not meet FCC guidelines if the proportion of minority and female representation on their overall staff is not at least 50% that of the relevant labor force, and at least 25% of the relevant labor force for their upper-level staff positions. Stations with 11 or more full-time employees do not meet the guidelines if the proportion of minority and female representation is not at least 50% of that of the relevant labor force for both overall and upper-level job categories. NPRM, para. 10.

The Commission characterizes its EEO Program as a program to increase the "pool of qualified female and minority candidates from which a licensee or regulatee can select the best qualified applicant, without regard to gender, race or ethnic origin." NPRM, para. 7. *Compare, Tidewater Communications, Inc.* at para. 5. This characterization inaccurately suggests that hiring decisions are irrelevant to the EEO Program. Quite to the contrary, the EEO Program is clearly designed to affect the hiring and promotional decisions of broadcast licensees. The success of the EEO Program is typically measured in terms of changes in the employment profile of the broadcast industry. The NPRM emphasizes

that the EEO Program helps minorities obtain the employment experience by which they acquire skills to become media owners and entrepreneurs. NPRM, para.3. In a statement attached to the NPRM, then Commissioner Barrett expressed a reluctance to relax EEO requirements because “the Commission’s employment statistics for broadcast stations evidence only a minimal increase in the number of minority employees at broadcast stations, despite what some have considered the Commission’s ‘aggressive’ EEO provisions.”

The Commission routinely takes hiring decisions into account in reviewing a station’s EEO performance. *See, e.g. Holiday Broadcasting Company*, FCC 95-153 para. 14 (April 27, 1995) (“KDYL/KSFI-FM hired no minorities for its 16 full-time jobs for the period under review.”) Compare *GAF Broadcasting Co.*, FCC 95-271 (1995), para. 11. (“[M]inority hiring results are not more important than recruitment procedures and record keeping. Such results are but one factor in our analysis of the success of a licensee’s recruitment efforts.”) If hiring of minorities at a station falls below statistical guidelines, the FCC initiates a “*Bilingual*” inquiry, which requires the station to detail its recruitment and hiring efforts with respect to each job opening for the last three years of the license term and to specify the race of all job applicants and hires. See NPRM, p. 7, n. 20.

The Commission contends that “in no situation are a station’s efforts found to be unsatisfactory or is it found to have violated the EEO Rule simply because it does not meet the processing guidelines.” NPRM, para. 10. Compare *Tidewater Communications, Inc.* at 2. Such a contention, perhaps naively, ignores the adverse effects of being

subjected to an EEO inquiry. EEO inquiries not only require a station to document virtually every activity related to every job opening over a three year period, but hold the broadcast license in abeyance, typically for years, while the inquiry is pending. The station's license is placed under a cloud, and may not be renewed, assigned or transferred until the inquiry is completed and the license renewed. Thus, even if no forfeiture is imposed, the licensee is deprived of the ability to undertake transactions involving a transfer or assignment of the license. For example, in *Retlaw Enterprises* (KEPR-TV) FCC 96-251 (June 11, 1996), the Commission granted the license renewal for Station KEPR-TV, Paseo, Washington, without forfeiture or condition after finding that a Petition to Deny filed by the NAACP had "failed to make specific allegations of fact that would, if true, demonstrate that grant of the application would be inconsistent with the public interest." What the decision does not discuss is the fact that the renewal application was filed in October, 1993, and that the ruling on the Petition to Deny was not issued until June 1996. Accord *Retlaw Enterprises, Inc. (KIMA-TV)*, FCC 96-229 (June 20, 1996); compare *Regents of New Mexico State University*, FCC 96-231 (June 3, 1996). Although the Commission imposed no condition or monetary sanction on any of the licensees involved in these cases, it nonetheless imposed a very practical liability: it withheld the grant of the renewal application and made assignment of the licenses impossible for a period of almost three years, even though the complainant in each case failed to make even a *prima facie* case that the licensee had violated EEO requirements.

The Commission maintains that its EEO Program does not require that any person be hired or accorded a hiring preference based on racial or ethnic status. See *Tidewater Communications, Inc.*, *supra* p.10. While it may be true that the FCC does not literally dictate individual hiring decisions, it is also undeniably true that its EEO Program imposes a racial classificatory system that goes well beyond "recruitment efforts" and has a compelling effect on hiring decisions. See *GAF Broadcasting Co.* *supra* p. 10. (Minority hiring a factor in analysis of the success of recruitment efforts).

The following hypothetical will illustrate this effect: assume that a broadcast station with an EEO profile that exactly meets the EEO processing guidelines loses a minority employee in the months just prior to the filing of its renewal application. The station could take the Commission at its word ("In no situation are a station's efforts found to be unsatisfactory or it is found to have violated the EEO Rule solely because it does not meet processing guidelines," *Tidewater Communications, Inc.* at para. 6) and hire a non-minority replacement. While such a decision might well be based upon the applicant's qualification, it would nonetheless also be extremely impractical. The hiring decision would almost certainly invite a petition to deny its renewal application or a *Bilingual* inquiry from Commission staff. The station would be required to detail its hiring efforts for every job opening for the three-year period preceding the filing of its application and describe the racial characteristics of every applicant and interviewee for that time period. It would, of course, have the right to submit exhaustive factual evidence and legal argument to demonstrate that it had complied

with all requirements of the EEO Program. If it had maintained impeccable records of hiring and recruitment efforts and retained competent counsel, the station might, within a matter of years, like the stations discussed *infra* p. 23, be exonerated of any violation.

Alternatively, the station could hire a minority replacement that would bring it within EEO processing guidelines and obtain a prompt and probably uncontested grant of its renewal application. While the EEO Program does not "require" the station to take the second option, it imposes harsh consequences for not doing so. No station that wishes to be able to assign its license in the foreseeable future can ignore those consequences.

In light of these facts, the Commission cannot reasonably conclude that its EEO Program is merely a "race neutral" form of "outreach" rather than a system designed to affect hiring and promotional decisions based upon race. Accordingly, the EEO Program must be reviewed according to the strict standards articulated in *Adarand*.

**B. THE FCC'S EEO POLICY DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST.**

According to the NPRM, "the overriding goal underlying our EEO rules is to promote program diversity." NPRM, para. 6, citing *Implementation of Commission's Equal Employment Opportunity Rules*, 9 FCC Rcd 2047 (1994). The EEO rules are designed to "enhance access by minorities and women to employment opportunities in broadcasting to ensure that broadcast programming more accurately reflects the views

and interests of all members of a broadcaster's community of license." NPRM, para. 6.

What is diversity of programming? Although the term suggests that it is programming oriented to minority and female audiences, the Commission has rejected such an interpretation.

A basic rationale underlying the broadcast EEO Rules has been that a broadcaster can more effectively fulfill its duty to serve the needs of the entire community if it makes a good faith effort to employ qualified women and minorities. The Commission does not assume that minority and female employment will always lead to minority and female-oriented programming or to the expression of a particular minority or female viewpoint on the airwaves. We are also aware that all minorities, as well as all women, do not share the same viewpoints. Nonetheless, as more minorities and women are employed in the broadcast industry, varying perspectives are more likely to be aired.

NPRM, para. 3.

This explanation explains nothing. On the one hand, the Commission declares that minorities and women do not have a "particular minority or female viewpoint," yet on the other hand, it declares that the employment of minorities and women will result in the airing of programs which reflect the viewpoints of women and minority groups. While the Commission is justifiably reluctant to stereotype the thought processes or programming preferences of minorities and women, *See Lamprecht v. FCC*, 958 F.2d 328, 398 (D.C. Cir. 1992), it falls into precisely such stereotyping by concluding that the "views and interests" of women and minorities are, in some unexplained way, categorically different from those of men and members of non-minority races.

The Commission's refusal to establish a relationship between "diversity" and any identifiable form of programming creates two problems. First, this position is inconsistent with Commission statements that a fundamental purpose of the EEO Program is to assure "programming [that] fairly reflects the tastes and viewpoints of minority groups." NPRM, para. 5. Second, the position renders the concept of "program diversity" meaningless. If "program diversity" cannot be measured by identifiable types of programming, it cannot it be measured at all.

The fact is that, "program diversity" is a will-o-the-wisp. It beckons and shimmers, but retreats when approached, and ultimately evaporates into thin air. Although the Commission has long vaunted "diversity" as the primary goal of its EEO Program, it has never defined the term nor applied it to the evaluation of a station's EEO performance. No EEO forfeiture has ever been withheld or reduced on grounds that the station had achieved a satisfactory degree of "program diversity."

The NPRM offers no clue as to the meaning of program diversity, and proposes no standard for determining when such a goal has been achieved. The "processing guidelines" used to select renewal applications for closer scrutiny depend solely on employment statistics. Not one of the forfeiture criteria set forth in the NPRM relates to the question of whether the licensee has achieved some measurable form of diverse programming.

In many ways "diversity" is to the FCC's EEO Program what "integration" was to its comparative criteria -- a predictive judgment which decades of experience have failed to corroborate. The findings of

the Court of Appeals for the District of Columbia Circuit with respect to the integration criterion apply with equal weight to diversity as the rationale for the EEO Program:

Despite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it. As a result, the Commission ultimately rests its defense of the integration criterion on the deference we owe to its “predictive judgments.”

*Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

As the 1995 DOJ Memo clearly indicates, a concept as elusive as “diversity” cannot be a compelling governmental goal. In order to support a classification system dependent upon race, “diversity” must be based upon a factual predicate which permits the government to make reasoned judgments as to whether some goal other than “diversity” will be achieved.

[T]o the extent that an agency administers a nonremedial program intended to promote diversity, the factual predicate must show that greater diversity would foster some larger societal goal beyond diversity for diversity’s sake. The level and precision of empirical evidence supporting that nexus may vary, depending on the nature and purpose of a nonremedial program. For a nonremedial program, the source, type, scope, authorship and timing of underlying findings should be assessed, just as for remedial programs.

1995 DOJ Memo, p. 36.

The FCC may not avoid scrutiny by shrouding its EEO Program in mystery. If the purpose of the EEO Program is to increase diversity of programming, there must be some objective method of determining when

programming is “diverse” and whether there is a causal nexus between a station’s employment practices and the diversity of its programming.

It should be noted that the primary purpose of EEO Program is the prospective creation of diverse programming, not the retrospective remediation of curing of the effects of past discrimination. The Commission has always rejected the proposition that its EEO Program serves a remedial purpose. In adopting its EEO Program in 1968, the Commission emphasized that the purpose of the Program was *not* to rectify a pattern of past discrimination in the broadcast industry. See *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 13 FCC 2d 766, 775 (1968) (“We stress that we are not condemning the broadcast media for past actions or neglect.”)

**C. THE FCC’S EEO PROGRAM IS NOT NARROWLY TAILORED TO ACHIEVE ITS STATED OBJECTIVES.**

Governmental classification schemes based on race must not only advance a compelling governmental interest, but be narrowly tailored to achieve that interest. See *Adarand*, 115 S.Ct at 2113. The 1995 DOJ Memo articulates six factors to be considered in determining whether regulations have been narrowly tailored to achieve their goals. These are: (1) whether the government considered race-neutral alternatives before resorting to race-conscious action; (2) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program’s scope; (3) whether race is a factor in determining eligibility for a program or just one factor in the decision making process; (4) the comparison of any numerical target to the

number of qualified minorities in the relevant sector or industry; (5) the duration of the program and whether it is subject to periodic review; and (6) the degree and type of burden caused by the program. 1995 DOJ Memo, p. 19. Each of these factors is discussed in Haley Bader & Potts Petition for Rule Making, and that discussion will be incorporated by reference rather than repeated. Some additional discussion of factor (1) is warranted, however.

In deciding whether its EEO requirements are narrowly tailored to “promote program diversity,” NPRM, para. 6, whatever that term may mean, the Commission must consider race-neutral alternative means of achieving that goal. When the EEO Rules were adopted, satellite and cable technologies were in their infancy. There was no DBS, DARS, or LPTV, no MDS, MMDS or LMDS, no audio-on-demand, no inter-active TV, no CD-ROM, no Walkman, Discman, or VCR, no Internet or World Wide Web. All of these communications technologies have either come into existence or reached maturity during the past 25 years, and have vastly increased the “diversity of programming” available to the American public.

Broadcasting itself has undergone explosive growth in the past 25 years. In December, 1968, there were 4,235 licensed AM stations, 2,276 FM stations, and 840 television stations, for a total of 7,351 full-service broadcast stations. As of May, 1996, there were 4,890 licensed AM stations, 7,179 commercial and noncommercial FM stations and 1,550 television stations, for a total of 13,619 full-service broadcast stations -- almost double the number that existed in 1969.

In light of both the astonishing development of new forms of communications and the growth of broadcasting medium itself, the Commission must carefully weigh the issue of whether a broadcast EEO Program can be justified as a means of increasing “diversity” of programming, or whether race-neutral methods of achieving this goal are more effective.

As the hegemony of broadcast programming declines, so does the need for regulatory machinery designed to assure that the American public receives “diverse” broadcast programming. Both the FCC and Congress have acted on this principle to relax or eliminate overly burdensome requirements. Based in part on the Commission’s findings as to the growth in the “accessibility and diversity” of electronic media, the Commission concluded that its “Fairness Doctrine” was no longer necessary to assure that controversial issues would be discussed from diverse perspectives. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). Non-entertainment program guidelines, formal ascertainment procedures, quantitative limits on the amount of commercial matter, programming log requirements, and a host of other requirements, were “deregulated” precisely on grounds that the proliferation of broadcast services had provided “diverse sorts of programming,” *Deregulation of Radio*, 84 FCC 2d 968, 969 (1981), recon. granted in part, 87 FCC 2d 797 (1981), aff’d in part and remanded in part sub nom. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

Fundamental principles designed to assure a high level of “diversity” in the broadcast medium remain in effect. The

Telecommunications Act of 1996 retains limits on the number and type of broadcast stations that may be owned or operated in any given market Pub. L. No. 104-104, 110 Stat. 56 (1996) Section 202, and broadcast licensees are charged with a non-delegatable duty to assure that all programming serves the public interest. This general duty includes the specific duties of determining the needs of each station's community of license, broadcasting programming responsive to those needs, and creating a quarterly "Issues/Programs" list that documents these efforts. See 47 C.F.R. 73.3526(a)(9), 73.3527(a)(7). In addition, the Communications Act continues to reserve spectrum for noncommercial educational services which will "constitute an expression of diversity and excellence and which will constitute a source of alternative telecommunications services for all the citizens of the Nation." 47 U.S.C. 396(a)(5). Nothing in the NPRM suggests that any of the general principles embodied in the Communications Act or any of the specific "ascertainment" duties contained in Commission regulations are ineffective at achieving their goal of assuring program diversity.

Given the array of technological and regulatory alternatives for promoting program diversity, the Commission must demonstrate that its EEO Program remains a narrowly tailored means of achieving the same goal. The Commission cannot side-step this obligation simply by declaring that its EEO Program is a "mere outreach" program that does not implicate Equal Protection considerations.

**II. THE PROPOSED FORFEITURE GUIDELINES ARE UNRELATED TO THE OBJECTIVES OF THE EEO PROGRAM AND ARE OVERLY COMPLEX.**

In order to “provide broadcasters with a greater degree of predictability and certainty,” the Commission has proposed to adopt “non-binding” guidelines for assessing forfeitures for violations of its EEO Program. NPRM, para 2. Far from providing “predictability and certainty,” the proposed guidelines would enormously complicate the assessment of forfeitures without advancing the stated goals of the EEO Program.

The forfeiture guidelines would introduce a host of new definitional terms into the forfeiture process. These terms would include “recruit so as to attract,” “vacancies,” “adequate pool,” “applicants,” “qualified,” “Many Hires,” “Large Minority Labor Force,” “Dual EEO Violation,” “period under review,” and others. Many of these defined terms are themselves comprised of multiple factors. For example, an “adequate pool,” the NPRM informs us, “will vary from station to station, depending on factors such as the applicable labor force, staff size, number of hiring opportunities, applicant and interview pool assessment, and employment profiles.” NPRM, para 43.

The proposed forfeiture guidelines do not advance the stated objective of the NPRM -- to eliminate EEO requirements that unnecessarily burden broadcasters and “provide relief,” NPRM, para. 1. They, instead, illustrate the worst tendency of regulatory requirements to spread like kudzu and take on a luxuriant life of their own. If the EEO

Program is a “mere outreach” program, it should not need to be enforced through forfeiture guidelines as complex as the payment schedules of a health reform bill.

The NPRM offers a unique opportunity to simplify rather than complicate the EEO Program. The first question -- not posed by the NPRM -- is whether any “forfeiture guidelines” are necessary. As discussed above, there is no evidence that the EEO Program in any way advances its “overriding goal” of promoting “program diversity.” See NPRM, para. 6. If the EEO Program is wholly ineffective in achieving its goal, it is pointless to codify a system of forfeitures. A horse headed nowhere won’t arrive sooner by being whipped.

It is time to admit that there are better, race-neutral alternatives to the achievement of “diversity,” and to limit the FCC’s EEO Program to its secondary goal of prospectively deterring “discriminatory employment practices.” NPRM, para. 3. As the Commission has acknowledged, it does not have a “sweeping mandate to further the ‘national policy’ against discrimination,” nor should it “duplicate the regulatory efforts of specialized agencies such as the EEOC.” *Nondiscrimination in Employment Practices*, 60 FCC 226, 229-230 (1976). The purpose of the EEO Program can therefore be achieved by limiting the Commission’s action to reviewing “final determinations of complaints filed with government agencies and/or courts established to enforce nondiscrimination laws.” NPRM, para. 9.

Even by its own account, the Commission’s current EEO Program is exceptionally inefficient. In its 1994 *Notice of Inquiry*, the Commission estimated that approximately two-thirds of the more than 13,000